

2000

The State of Utah v. Benjamin Matthew Nunley : Brief of Appellant

Utah Court of Appeals

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Catherine E. Lilly; Robert K. Heineman; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.
Jan Graham; Utah Attorney General; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
BENJAMIN MATTHEW NUNLEY, : Case No. 20000196-CA
Defendant/Appellant. : Priority No. ~~15~~ 2

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Aggravated Assault, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-4-101 and 76-5-103(3) (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael K. Burton, Judge, presiding.

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Attorney for Appellee

FILED
Utah Court of Appeals

JUN 16 2000

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
BENJAMIN MATTHEW NUNLEY, : Case No. 20000196-CA
Defendant/Appellant. : Priority No. 15

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
BENJAMIN MATTHEW NUNLEY, : Case No. 20000196-CA
Defendant/Appellant. : Priority No. 15

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for Attempted Aggravated Assault, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-4-101 and 76-5-103(3) (1999), in the Third Judicial District Court, State of Utah, the Honorable Michael K. Burton, Judge, presiding. Jurisdiction is conferred on this court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). See Addendum A (Judgment, Sentence and Conviction).

STATEMENT OF THE ISSUE AND THE STANDARD OF REVIEW

ISSUE: Did the trial court abuse its discretion in adjusting a restitution upward to \$19,646.15 where Appellant was originally ordered to pay \$16,000 at his sentencing?

Standard of Review: "We will not disturb a trial court's order of restitution unless the 'trial court exceeds the authority prescribed by law or abuses its discretion.'" State v. Twitchell, 832 P.2d 866, 868 (Utah App. 1992) (quotation and citations omitted).

PRESERVATION OF THE ARGUMENT

Appellant Benjamin Matthew Nunley's ("Nunley") challenge to the restitution order is preserved on the record for appeal ("R.") at 64 (restitution hearing). His underlying sentencing is preserved at R.65.

STATUTE

Utah Code Ann. § 76-3-201 (1999) is determinative of the issue on appeal. It provides in relevant part:

Sentences or combination of sentences allowed--Civil penalties- -Restitution--Hearing--Definitions

(1) As used in this section:

(a) "Conviction" includes a: . . . (ii) plea of guilty.

(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including the accrual of interest from the time of sentencing, insured damages, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Subsection (4)(c).

(e) (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities. . . .

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them: . . . (c) to

probation unless otherwise specifically provided by law; . .
. .

(4) (a) (i) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. For purposes of restitution, a victim has the meaning as defined in Subsection (1)(e).

(ii) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (4)(c) and (4)(d). . . .

(b) . . . (ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (4)(c).

(c) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(i) Complete restitution means the restitution necessary to compensate a victim for all losses caused by the defendant.

(ii) Court-ordered restitution means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing.

(iii) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (8).

(d) (i) If the court determines that restitution is appropriate or inappropriate under this subsection, the court shall make the reasons for the decision a part of the court record. . . .

(e) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow the defendant a full hearing on the issue. . . .

(8) (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense, that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant

facts, including:

- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
- (ii) the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; the cost of necessary physical and occupational therapy and rehabilitation; and the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim; . .

. .
(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsection (8)(b) and:

- (i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
- (ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
- (iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and
- (iv) other circumstances which the court determines make restitution inappropriate.

(d) The court may decline to make an order or may defer entering an order of restitution if the court determines that the complication and prolongation of the sentencing process, as a result of considering an order of restitution under this subsection, substantially outweighs the need to provide restitution to the victim.

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, and Disposition in the Court Below.

Nunley was charged by information with one count of aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103(3) (1999). R.1-2. An arrest warrant was issued. R.3. Nunley entered a plea of guilty to attempted aggravated assault, a class A misdemeanor, in violation of Utah

Code Ann. §§ 76-5-103(3) and 76-4-101. R.20.

A sentencing hearing was held on January 11, 2000. R.65. Nunley was ordered to pay \$16,000 (including \$521 in medical expenses) in restitution at \$1000 per month, in addition to court-ordered counseling. R.41-42(minute Entry),43(Judgment and Sentence),65[16-20]. At Nunley's request, a restitution hearing was held on February 22, 2000. R.44,64. The victim, Joe Pilcher ("Pilcher"), testified that his actual lost wages and medical bills totaled \$19,646. R.64[9-10,13-16]. The hearing judge imposed \$19,646 in restitution to be paid at a rate of \$1000 per month. R.64[21]. Nunley timely appeals.

STATEMENT OF THE FACTS

Nunley entered a plea of guilty to attempted aggravated assault. R.20 (Plea Agreement). The Information alleged that Nunley struck Pilcher in the knee with a baseball bat during a driving dispute. R.1-2.

At a sentencing hearing held January 11, 2000, Nunley was sentenced to one year in jail. R.41-42. The jail term was suspended pending satisfactory completion of probation. Id. The Presentence Investigation Report ("PSR"), which was considered by the court at sentencing, noted that Pilcher's damages, including medical bills, amounted to \$15,500. R.27. At the hearing, the State averred, and Nunley conceded that Pilcher's actual damages were about \$16,000. R.65[5]. Accordingly, the court ordered Nunley to pay \$16,000 to Pilcher as compensation for lost

earnings during the six-week period he could not work and the \$521 in medical bills that he had to pay as a result of his injuries. R.41-42 (Minute Entry).

At Nunley's request, a restitution hearing was held on February 22, 2000. R.44,64. Nunley sought to challenge the \$16,000 figure ordered by the court. Id. Pilcher testified as to his injury, his medical bills totaling \$521.15, his work as a plumber, the period he could not work, and his typical billings for various periods of the year. R.64[4-16]. He established March through May, the period in which he was laid up with his injury, were his most profitable months. R.64[9].

The court found that Pilcher averaged \$19,125 in lost wages during those months. R.64[21]. When added to the \$521 in medical bills, the court concluded that Nunley owed Pilcher \$19,646.15 total. Id. The court accordingly amended the restitution amount to \$19,646.15. Id.

Nunley objected to the upwardly amended restitution amount at the hearing. R.64[21-26]. He asserted that he knew two other plumbers who would be willing to testify that Pilcher's billing rates were inflated, and suggested that Pilcher's billing records could be falsified. R.64[22]. Nunley further suggested that Pilcher produce previous income tax returns to prove his income. R.64[25].

As to Nunley's proposed witnesses, the court asked Nunley

why he did not present those witnesses at the hearing. R.64[24]. Nunley responded that he did not know that people would be able to testify at this particular proceeding, and claimed that he did not know about "court procedure." Id. The court invited Nunley to present the witnesses at another hearing, but told Nunley that he would not change the restitution order based simply on Nunley's own summary of what the proposed witnesses might say. R.64[25-26]. The court also informed Nunley that he would have to provide notice to the court if he planned on calling the witnesses, as well as inform the witnesses that they needed to come to testify. R.64[26].

As to the tax returns, the court noted that they would not be helpful in that Pilcher made more money in the spring months, when he was laid up with his injury, than at other times of the year. R.64[26]. Nunley responded that they would nonetheless provide proof of an average income. R.64[26].

The court concluded that it was "comfortable with the substantialness [sic] of the proof." R.64[26]. The judge further stated that Nunley

hit [Pilcher] with a baseball bat in the knee and ma[d]e it so he couldn't work [from March to May, and so] he lost that kind of income. . . . I think he has billables there that show a time when he did less work, that that's what he got.

That's why I'm comfortable with the substance of what he's given me; but if you have somebody who's got a contradictory view, I guess I'm happy to hear that, but I guess we need to have notice. . . . And I guess you need to know that they need to be told to come.

R.64[26].

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in amending the restitution amount upward from \$16,000 to \$19,646.15. The maximum amount of restitution that the court could impose was factually established at Nunley's sentencing, where it arrived at the \$16,000 amount based on the PSR and a figure presented by the State and agreed to by Nunley. Moreover, the \$16,000 figure adequately reflected statutory considerations prescribed in Utah Code Ann. § 76-3-201 (1999). The increase of the restitution award chills Nunley's right to a restitution hearing. Accordingly, the trial court could only impose a maximum of \$16,000, and less if the evidence merited it, at Nunley's restitution hearing.

ARGUMENT

ISSUE: THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING RESTITUTION IN AN AMOUNT THAT EXCEEDED THE FACTUALLY ESTABLISHED FIGURE OF \$16,000.

The trial court abused its discretion in ordering Nunley to pay \$19,646.15 in restitution under § 76-3-201. See State v. Twitchell, 832 P.2d 866, 868 (Utah App. 1992). A "trial court [has] both discretion in sentencing to select one or a combination of options including probation, see [] § 76-3-201(1), and a mandate to order restitution when appropriate: 'When a person is adjudged guilty of criminal activity which has resulted in pecuniary damages, in addition to any other sentence it may

impose, the court shall order that the defendant make restitution' to victims unless it determines that restitution is inappropriate, id. at § 76-3-201(3)(a) []; see also State v. Snyder, 747 P.2d 417, 420 (Utah 1987)." State v. Dickey, 841 P.2d 1203, 1207 (Utah App. 1992).

The trial court's "authority [to order restitution,] however, is limited by the sentencing statute. See Utah Code Ann. § 76-3-201(2) (Supp.199[9]). Therefore, we will not disturb the court's restitution order unless it exceeds that prescribed by law or otherwise abused its discretion." State v. Schweitzer, 943 P.2d 649, 653 (Utah App. 1997) (citing Twitchell, 832 P.2d at 868; State v. Gerrard, 584 P.2d 885, 887-88 (Utah 1978)).

The guidelines for determining the amount of restitution to be imposed are outlined in § 76-3-201(4)(a)(i) and -(8)(a)-(c). They are as follows:

(4) (a) (i) When a person is convicted of criminal activity that has resulted in pecuniary damages¹, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. For purposes of restitution, a victim has the meaning as defined in Subsection (1)(e). . . .

(8) (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing

¹ Section 76-3-201(1)(c) provides, "'Pecuniary damages' means all special damages . . . which a person could recover against a defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes . . . losses including earnings and medical expenses."

court or to which the defendant agrees to pay restitution. A victim of an offense, that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; the cost of necessary physical and occupational therapy and rehabilitation; and the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim; . .

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsection (8)(b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

Utah Code Ann. § 76-3-201(8)(a)-(c).

In the present case, the trial court abused its discretion in ordering Nunley to pay \$19,646.15 because the trial court had

previously established the amount of restitution at \$16,000 when it considered the PSR and the State's adjusted figures to arrive at that dollar amount. R.27;65[5]. Accordingly, the \$16,000 figure became fact as to the amount of loss for restitution purposes under § 76-3-201. See State v. Tindal, 748 P.2d 695 (Wash. App. 1988). The court, therefore, could impose a maximum of \$16,000, or less if the evidence merited it, at Nunley's succeeding restitution hearing.

In Tindal, the Court of Appeals for the State of Washington held that the amount of restitution that the defendant owed was legally established for purposes of restitution where the "certificate of probable cause set forth the amount" and the certificate was "incorporated by reference into the plea agreement" underlying the restitution order. Id. at 696. The Court stated that the specified amount "bec[a]me[] fact" and, therefore, that defendant could be ordered to pay it under Washington's restitution statute. Id. (citing RCW 9.94A.370(2)). Accordingly, the Washington Court of Appeals vacated the restitution order of \$25,666.39 because it exceeded the factually established amount. Id.

The reasoning of Tindal compels the conclusion that the trial court in the present case abused its discretion in ordering Nunley to pay \$19,646.15. At the January 11, 2000, sentencing hearing, the court established that Nunley owed Pilcher \$16,000. R.41-41 (minute entry). That figure was premised upon a figure of \$15,500 set forth in the PSR, R.27, which was "incorporated"

into the sentencing hearing. Tindal, 748 P.2d at 696; R.65[5]. The \$16,000 amount was also premised on an adjusted estimate of \$16,000 proposed by the State and agreed to by Nunley at his sentencing hearing. R.65[5].

Moreover, the figures set forth by the PSR and the State adequately reflect the statutorily prescribed considerations contained in § 76-3-201(4)(a)(i) (lost earnings and medical expenses) and § 76-3-201(8)(a)(ii) (medical expenses and lost income resulting from physical injury suffered by victim). The PSR statement regarding Pilcher's damages evinces the way in which it adequately accounted for the factors set forth in § 76-3-201:

The victim [] estimat[ed] his medical expenses at \$500 but will provide the court with an exact amount. He [] estimated losing profits of \$15,000 due [to] his not being able to work . . . for one and one-half months. He stated his average daily gross income at that particular time of year is \$500 per day, and was unable to perform his usual duties for 30 working days.

R.27. The transcript concerning the State's minor adjustment to \$16,000, which Nunley agreed to, likewise reflects Pilcher's damages. R.65[5].

Finally, as a matter of policy, trial courts under similar circumstances as those of the case at bar should not be able to increase the amount of a restitution order because it chills a defendant's exercise of his right to a restitution hearing. See State v. Starnes, 841 P.2d 712, 715 (Utah App. 1992) ("defendant is statutorily entitled to a 'full hearing' on the question of restitution") (citing § 76-3-201(3)(c)). As in cases where

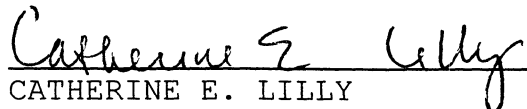
defendants prevail on appeal and cannot thereafter be sentenced more harshly, defendants like Nunley, who agree with the State as to the amount of restitution at a preceding sentencing hearing, should not be subject to an increased restitution order simply because they elect to have the restitution hearing to which they are entitled. See, e.g., State v. Sorensen, 639 P.2d 179, 180 (Utah 1981). Indeed, the specter of either the prosecution or the court threatening the possibility of a higher restitution award should the defendant proceed with a restitution hearing acts as the same sort of hindrance to the exercise of such right as the threat of a harsher sentence after a successful appeal. Id.

In light of the foregoing, the trial court abused its discretion in increasing Nunley's restitution award. See Twitchell, 832 P.2d at 868. For purposes of restitution, the \$16,000 figure "bec[ame] fact" because the State, the court, and Nunley agreed to that amount at the sentencing hearing. Tindal, 748 P.2d at 696. Moreover, the \$16,000 figure adequately represents the statutory guidelines set forth in § 76-3-201. Finally, the trial court's increased restitution order chills Nunley's exercise of his statutory right to a restitution hearing. See Starnes, 841 P.2d at 715; see, e.g., Sorensen, 639 P.2d at 180. Accordingly, the trial court could only impose a maximum of \$16,000, or a lesser amount if the evidence warranted it, at Nunley's succeeding restitution hearing.

CONCLUSION

In light of the foregoing, Nunley respectfully requests this Court to vacate the erroneous restitution order and remand for resentencing.

SUBMITTED this 16th day of June, 2000.



CATHERINE E. LILLY
Attorney for Defendant/Appellant

ROBERT K. HEINEMAN
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 16th day of June, 2000.



CATHERINE E. LILLY

ADDENDUM A

THIRD DISTRICT COURT MURRAY COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
vs.	:	Case No: 991200735 FS
	:	
BENJAMIN MATTHEW NUNLEY,	:	Judge: MICHAEL K. BURTON
Defendant.	:	Date: January 11, 2000

Clerk: lindav
DEFENDANT INFORMATION
Date of birth: October 11, 1971
Audio

CHARGES

1. ATTEMPTED AGGRAVATED ASSAULT (amended) -
Class A Misdemeanor
Plea: Guilty - Disposition: 11/17/1999 Guilty Plea

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED AGGRAVATED ASSAULT
a Class A Misdemeanor, the defendant is sentenced to a term of 365
day(s) The total time suspended for this charge is 365 day(s).

SENTENCE FINE PAYMENT NOTE

\$1000.00 PER MONTH BEGINNING 2/28/2000

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant is to pay a fine of 0

Case No: 991200735
Date: Jan 11, 2000

PROBATION CONDITIONS

Pay fines and fees as agreed
No Violations of the Law
Evaluation and Treatment as deemed necessary.
COURT ORDERED DEFT TO COMPLETE ANGER MANAGEMENT CLASSES AND FAMILY
COUNSELING AS AP&P DIRECTS
DEFT TO PAY RESTITUTION OF \$16,000.00
COURT ORDERED \$1000.00 DUE 2/28/2000.
DEFT TO REPORT TO AP&P (PRESTON KAY) IMMEDIATELY
COURT ORDERS JAIL TO BE IMPOSED IF RESTITUTION IS NOT PAID, AS
ORDERED.

Dated this 11 day of Jan, 2000.



MICHAEL K. BURTON
District Court Judge



THIRD DISTRICT COURT MURRAY COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	RESTITUTION HEARING
	:	
	:	
vs.	:	Case No: 991200735 FS
	:	
BENJAMIN MATTHEW NUNLEY,	:	Judge: MICHAEL K. BURTON
Defendant.	:	Date: February 22, 2000

PRESENT

Clerk: lindav

Prosecutor: WALSH, DAVID

Defendant

Defendant's Attorney(s): HEINEMAN, ROBERT K

DEFENDANT INFORMATION

Date of birth: October 11, 1971

Audio

Tape Number: 00-128 Tape Count: 650

CHARGES

1. ATTEMPTED AGGRAVATED ASSAULT (amended) -
Class A Misdemeanor
Plea: Guilty - Disposition: 11/17/1999 Guilty Plea

HEARING

COUNT: 650

JOE PILCHER, VICTIM, SWORN AND TESTIFIES ON STATE BEHALF. STATE
EXHIBIT 1 (INVOICES) WERE MARKED, OFFERED AND IDENTIFIED BY VICTIM.

COUNT: 1300

STATE REDIRECT OF JOE PILCHER

COUNT: 1110

DEFT CROSS EXAMINATION OF VICTIM. STATE WITHDRAWS EXHIBIT.

COUNT: 1700

COURT ORDERS RESTITUTION DUE IN AMOUNT OF \$19125.00 FOR WAGES AND
PROFIT LOST, \$521.00 MEDICAL FOR TOTAL: \$19646.15

Case No: 991200735
Date: Feb 22, 2000

COUNT: 1960

DEFT'S STATEMENT TO COURT AND OBJECTION TO AMOUNT DUE. COURT
ADVISES DEFT TO HAVE HIS ATTORNEY MOTION THIS UP AGAIN, IF
NECESSARY.

Dated this 22 day of Feb, 2000

Michael K. Burton
MICHAEL K. BURTON
District Court Judge

